No. 16,109

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET LILLIAN FERGUSON, NEWTON IVAN SHERRY and LOIS SHERRY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPELLANTS' REPLY BRIEF.

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It is, of course, not disputed that the situation presented in the instant appeal is the reverse of that ordinarily found in cases involving so-called family partnerships. Ordinarily, the Commissioner of Internal Revenue is on the side attacking the validity of the partnership and attempting to lay the tax burden upon the shoulders of a single one of the alleged partners.

Despite this shift from his ordinary position in such matters, the same rules of law apply in the determination of the controversy between the adversaries as would apply if the Commissioner were on the opposite side thereof.

It is the contention of these appellants that the Commissioner, in his original determination, and the Tax Court, in its decision, have overlooked or ignored certain basic principles of law and justice which require a result

other than that reached by the Tax Court and here put forward by the Respondent in his brief filed with this Court. It is appellants' contention that they were not members of a family partnership into which they had willingly or freely entered, and that the purported family partnership attempted to be set up by appellants' father was not formed in good faith or for a business purpose.

The Evidence.

Respondent, under the heading "Statement" (Resp. Br. 5-13), has merely restated the findings of fact by the Tax Court, rather than summarizing all of the evidence produced, as was done by the appellants in their opening brief (App. Br. 4-12). The effect, therefore, was merely to present a summary of those evidentiary matters and conclusions drawn by the trier, thus minimizing the overwhelming evidence contained in the record which indicated that the appellants were entirely passive participants in the scene, acting solely under the dominance of their father, and without hope or expectation of ultimate reward, other than the satisfaction of being dutiful and obedient children to their surviving parent. The idea of the so-called partnership was originated in their absence, the papers were drawn at the instructions and instance of their father, without their consultation, and the papers then sent to them with the command to sign. As pointed out in the opening brief, the appellants never participated in the partnership affairs, nor reaped any benefit therefrom. They obviously contributed nothing, either by way of capital or services, and received nothing by reason of their alleged "partnership."

This Court is clearly not bound by the alleged findings of fact as construed by the Tax Court and as propounded by respondent, but is entitled to view and search the en-

tire record of the proceedings and to relate every part of the substantial evidence to the whole of the evidence, and to draw such inferences or conclusions therefrom as this Court may deem proper, the inferences or conclusions of the Tax Court notwithstanding (*Gillette's Estate, et al. v. Commissioner* (C. A. 9, 1950), 182 F. 2d 1010; *United States v. United States Gypsum Co.,* 333 U. S. 364, 394-395; *Int. Rev. Code of 1954,* Sec. 7482(a); *Fed. Rules Civ. Proc.,* Rule 52(a)).

We therefore believe that this Court will look to the evidence as a whole, and not merely confine itself to those portions selected by the Tax Court and by the respondent to support his position.

Burden of Proof.

Respondent would seek to imply that, by reason of the fact that appellants herein are attacking a determination by the Commissioner that a partnership did in fact exist in 1945 and 1946, they have assumed some "burden of proof" over and beyond that which is required of taxpayers in any other appeal to the Tax Court from the Commissioner's determination (Resp. Br. 16-17, 29). We can find no support for this contention, either in the reported cases or in logic.

It is true that there is an initial presumption of correctness which attaches to any final determination by the Commissioner. This presumption, however, is one of law and not an inference of fact, and hence disappears when evidence sufficient to sustain a contrary finding has been introduced (*Crude Oil Corp. of America v. Commissioner* (C. A. 10, 1947), 161 F. 2d 809, and cases there collected; *Gillette's Estate v. Commissioner, supra; Lawrence v. Commissioner* (C. A. 9, 1944), 143 F. 2d 456).

Here, the evidence was not only sufficient to sustain a finding that the appellants had not entered into a partnership arrangement with their father, but, indeed, is compelling to the finding that they did not. The very primary essential to such a relationship, *a free and voluntary meeting of the minds, is entirely lacking.* Looking through the form (the documents signed by appellants under the domination of their father) to the substance (the control, management, and disposition of the property and its earnings) furnishes overwhelming evidence to refute the existence of an obligation which these children did not create and the fruits of which they never enjoyed (*cf. Gillette's Estate v. Commissioner, supra*).

Gist of Respondent's Argument.

The respondent, however, apparently does not place great reliance upon his repeated assertions that the appellants have failed to carry their "burden of proof," as he places the greatest weight (as did the Tax Court) upon the principles enunciated by this Court in *Maletis v. United States,* 200 F. 2d 97, cert. den. 345 U. S. 924 (Resp. Br. 17, 20-21). Thus, he argues that, in view of the formal subscription of the "partnership agreement" and tax returns purporting to show distribution of income, the appellants are precluded from attacking the reality and validity of the partnership, and the Commissioner's determination is unassailable.

Hence, argues the respondent, the appellants are not entitled to the benefit of the rules laid down by the Supreme Court in *Commissioner of Internal Revenue v. Culbertson,* 337 U. S. 733, 93 L. Ed. 1695, and by this Court in *Sellers v. Commissioner,* 218 F. 2d 380, for the determination of a valid and subsisting partnership for

purposes of taxation (*cf.* Resp. Br. 29), as contended by appellants in their opening brief.

In the *Maletis* case, the appellant was the *father,* who had created the purported partnership, elected to do business under that form, represented it in his returns to be a valid entity, and thereafter, because of a tax advantage to be gained, sought to disavow it. Under such circumstances, when the Commissioner, in the exigencies of tax collection, decided to hold the taxpayer to his original representations, the taxpayer could not be heard to complain, and the actual invalidity of the partnership was held to be irrelevant. Thus, in practical effect, the taxpayer, through his own active conduct and representations, had estopped himself from asserting the invalidity of that which he had created.

Undoubtedly, if the appellant here were Nathan Sherry, the father of these appellants, seeking to question the validity of the instant purported partnership, the principles of the *Maletis* case might apply. But these appellants, under the circumstances here disclosed by the evidence, are not so foreclosed. In reality, the acts and representations were not theirs, but those of their father. They should not be condemned to paying taxes upon income which they neither earned nor received. They clearly fall within the ruling of this Court enunciated in *Sellers v. Commissioner,* 218 F. 2d 380 (App. Br. 18-19).

Conclusion.

It is respectfully prayed that the decisions appealed from be reversed.

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Attorney for Appellants.